United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2295

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

FANNY HANDEL,

Plaintiff-Appellee,

vs.

MEYER GOLD,

Defendant-Appellant,

and

PREL CORPORATION,

Defendant.

On Appeal from an Order from the United States District Court — Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT

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ISSUES ON APPEAL

1. Did the District Court err in denying defendant's motion under Fed. R. Civ. Pro. 60(b) where the moving affidavits made a *prima facie* showing on the issues of mistake and excusable neglect as to his alleged failure to comply with discovery obligations, where meritorious defenses to the action were set forth and a large default judgment was at stake?

2. Did the District Court err in not applying a "good faith and wilfulness" standard to all of the parties in denying defendant's motion under Fed. R. Civ. Pro. 60(b) for an order vacating the default judgment?

3. Did the District Court make findings of fact that were not supported in the moving affidavits and were factually incorrect?

4. Did the District Court abuse its discretion in denying the defendant's motion under Fed. R. Civ. Pro. 60(b) where it was established that counsel rather than client was at fault?

5. Was the District Court required, constitutionally and as a matter of procedure, to hold evidentiary hearings on the defendant's motion under Fed. R. Civ. Pro. 60(b) as to the issues of fact presented in the affidavits concerning the defendant's conduct and what knowledge he in fact had in connection with his alleged failure to comply with his discovery obligations?

6. Was the defendant deprived of his property without due process of law in having his answer stricken and a default

judgment entered in the sum of $169,000 as a sanction under Fed. R. Civ. Pro. 37, when the sanction bore no reasonable relationship to the defendant's alleged failure to comply with discovery obligations?

An affirmative answer to any of the foregoing questions required a reversal of the order denying defendant's motion under Fed. R. Civ. Pro. 60(b).

STATEMENT OF THE CASE

Introduction

The defendant is appealing from an order denying his motion made pursuant to Fed. R. Civ. Pro. 60(b) to vacate a default judgment in the amount of $169,000 on the grounds that it was obtained by mistake or excusable neglect (5a-20a). The default judgment was entered pursuant to Fed. R. Civ. Pro. 37(d) for the failure of the defendant to answer interrogatories (54a-56a). The motion was granted without a hearing, in the absence of opposing papers, and without personal notice to the defendant at a time when it was apparent that the defendant's attorneys, without the knowledge of the defendant, had ceased to appear and answer in his behalf (54a-56a).

Briefly, this is an action brought by a nominal stockholder of Prel Corporation for an alleged violation of Section 16(b) of the Securities and Exchange Act of 1934 in that the defendant while the beneficial owner of more than ten percent of Prel's outstanding stock and within six months after acquiring said stock, sold stock on which he realized a profit. The answer

denied the material allegations of the complaint. In the motion to vacate under Fed. R. Civ. Pro. 60(b) the defendant submitted a letter from his accountant to the effect that no sale took place but Meyer Gold transferred an option to purchase 10,000 shares of Prel Corporation's stock to his brother-in-law without consideration (7a-8a). The report of Magistrate Jacobs, upon which the judgment is based, relied on inferences from the documents and circumstances and erroneously assumed the sale of these shares (86a). Magistrate Jacobs estimated a sales price which is unsupported by current practices for sale of the stock of unregistered securities (86a). All of these facts were readily ascertainable.

The plaintiff's attorneys, aware of the fact that the defendant's counsel had failed to appear at a pre-trial conference and failed to respond to other notices continued to fulfil the letter of the legal requirements while disregarding the realistic demands of the situation. Surely, once it became apparent that the defendant's attorney would not respond, notice of action proposed or taken should have been sent to the defendant personally. No such notice was sent until after default judgment was entered (24a-28a). On February 6, 1974 the plaintiff served Meyer Gold by registered mail with a notice to appear for a deposition for the discovery of assets (70a).

Thus, reduced to essentials, plaintiff, without having reached the merits of her case, obtained a huge judgment, in a matter where the defendant may have been entitled to a dismissal as a matter of law.

Nature of Action and Proceedings to Date

The plaintiff Fanny Handel, a stockholder of Prel Corporation, brought an action for the benefit of the nominal defendant Prel Corporation charging the defendant with violations of Section 16(b) of the Securities Exchange Act of 1934 as amended, 15 U.S.C. §78p(b). The plaintiff alleged that the defendant on or about September 16, 1971 purchased at least 265,647 shares of Prel Corporation common stock and became the beneficial owner of more than ten percent of its outstanding common stock. That within a period of less than six months the defendant sold at least 65,647 shares of the Prel common stock at a profit unknown to the plaintiff and said profit inures to and is recoverable by Prel Corporation by virtue of the Securities and Exchange Act (10a-12a). The United States Marshal served the defendant with the complaint and plaintiff's interrogatories on January 15, 1973 (10a-12a, 16a-20a). The defendant answered the complaint by his attorneys, Finkelstein, Benton & Soll denying the material allegations in the complaint and further alleging Prel Corporation rejected the plaintiff's demand to bring this action on the grounds that the claim was not factually correct and that no such action did in fact lie (13a-15a). Thereafter, the defendant's attorneys failed to answer the interrogatories, appear at a pre-trial conference, answer or even acknowledge any of the motions, notices, or orders that followed (25a-27a). There was no apparent reason for such failure to respond to the proceedings and the defendant had no knowledge or reason to believe that he was without representation (9a). The firm of Finkelstein, Benton & Soll was dissolved in 1973 during the period of this litigation (6a).

The docket entries in the District Court reveal the following activities of all of which were not attended or answered by the defendant or his attorneys and resulted in the entry of the default judgment (1a-2a).

May 30, 1973

Notice of Settlement of Order requiring Meyer Gold to answer the interrogatories prior to July 2, 1973.

October 5, 1973

Notice of Motion for a default judgment.

October 9, 1973

Notice to take the deposition of Jacob Burstyn and Prel Corporation.

October 26, 1973

Filed Order that default judgment be entered for plaintiff on behalf of the nominal defendant Prel Corporation that an inquest be held before Magistrate Jacobs to determine amount of damages and attorney's fees.

December 6, 1973

Notice of Entry of Judgment.

December 19, 1973

Inquest held before Magistrate Jacobs.

January 9, 1974

Filed report of Magistrate Jacobs.

Magistrate Jacobs' report approved and plaintiff directed to submit judgment in accordance with it to Magistrate Jacobs within ten days.

January 17, 1974

Filed judgment.

After the entry of default judgment the plaintiff served notice to take the deposition of the defendant for the discovery of assets (70a-73a). Meyer Gold still unaware of the fact that a judgment had been entered against him obtained a postponement of the deposition which was never rescheduled (79a). It was only after the attachment of his property in June, 1974 did Meyer Gold realize that a judgment had been entered against him (23a).

The defendant immediately retained new counsel who moved for an order under Fed. R. Civ. Pro. 60(b) to vacate the default judgment (5a-23a).

The motion was brought before Judge Kevin T. Duffy, the Part I Judge, since the Judge who ordered the default was on vacation until September, 1974 (5a).

By memorandum and order, dated July 29, 1974, that motion was denied.

"The Motion to vacate the default judgment pursuant to Rule 60(b) FRCP; is denied. The persistence of the defendant in ignoring the orders of this court, directed both to him and to his attorneys, constituted a blatent disregard for the process of justice. While the size of the judgment is large, the record in this case demonstrates that the plaintiff established a prima facie case before Magistrate Jacobs and that the default was not due to mistake or excusable neglect" (92a).

The Court's Opinion and Findings

The District Court totally misconstrued the legal standard for not relieving the defendant from the most drastic of all sanctions for his alleged failure to comply with discovery obligations and appears to have been equally misinformed as to the factual predicate therefor. Not only did the Court resolve factual disagreements against the defendant on the basis of affidavits, but made findings in its opinion that were not supported in the affidavits or other papers before it.

The Court in denying the defendant's motion to vacate the default judgment set forth as its basis for the denial:

(a) The persistence of the defendant in ignoring the orders of this Court, directed both to him and to his attorneys, constituted a blatent disregard for the process of justice.

(b) While the size of the judgment is large, the record in this case demonstrates that the plaintiff established a *prima facie* case before Magistrate Jacobs.

(c) The default was not due to mistake or excusable neglect.

THE COURT'S FINDINGS ANALYZED

1. The persistence of the defendant in ignoring the orders of this Court, directed both to him and to his attorneys, constituted a blatent disregard for the process of justice.

The affidavit of the defendant Meyer Gold, a man of limited education, sets forth the fact that he was unaware of any default or that he had disregarded any order of the Court (9a). In this regard Mr. Gold swore that

> ". . . it was his understanding that the action was to be primarily responded to by Prel Corporation and through New York Counsel; that an answer had been filed and that the examination of the books and records of the corporation was going on.
>
> He had received a notice for such examination but that it was not necessary for him to attend, and that without notice to him or without Court proceeding, a judgment was entered against him based on the fact that he did not appear for a hearing and that he did not appear based on an honest mistake and belief that it was not required" (9a).

In his affidavit Gold stated that he believed that an answer had been filed, which in fact had been filed and that he received a notice to appear for a deposition. The deposition which he referred to was for the purpose of discovery of assets scheduled for February 21, 1974 and cancelled by telephone call and never rescheduled (9a, 70a).

The plaintiff in his affidavit and exhibits *thereto* clearly demonstrates that the only documents which the defendant was served with personally was the complaint, interrogatories and the deposition for discovery of assets (24a-28a). These notices were responded to by the defendant Gold.

Thus, the record reveals that the defendant did not ignore any order of the Court which was directed to him. The plaintiff's attorney knew that the defendant's counsel did not intend to appear or respond after filing the answer, yet continued to send all notices and motions only to counsel and deliberately failed to notify the defendant personally of any of the proceedings (24a-28a). It was only after entry of default judgment that the plaintiff's attorney served any notice on the defendant. He served a notice by registered mail to take his deposition for the purpose of discovery of assets (70a). The facts did not support the Court's decision that the defendant ignored the orders of the Court and that they directed both to him and his counsel.

2. While the size of the judgment is large, the record in this case demonstrates that the plaintiff established a *prima facie* case before Magistrate Jacobs.

The plaintiff in her motion papers in opposition to the defendant's motion pursuant to Rule 60(b) Fed. R. Civ. Pro. did

not set forth the fact that she had established a *prima facie* case. In fact in the affidavit submitted by her attorney he swore:

> ". . .On December 19, 1973, a hearing was held before Magistrate Jacobs in which testimony and exhibits were received in evidence, and on January 2, 1974 Magistrate Jacobs filed his report recommending the entry of judgment for plaintiff in the amount of $150,000, together with interest at six percent from January 1, 1972.
>
> . . . On January 8, 1974, Judge Bonsal approved Magistrate Jacobs' report and directed plaintiff to submit a judgment . . ." (27a).

Magistrate Jacobs in his report stated:

> ". . . Sternberg by letter dated December 29, 1971 to Prel recites that he has an assignment from Gold of his right to purchase 10,000 shares at $7 per share and acknowledges that the stock is being acquired for investment. Quotation sheets of the over-the-counter market show that the market on December 29 was 22 bid — 23 asked. Thus, the short-swing profit to Gold would be $15 per share ($22 less $7) which on 10,000 shares would be $150,000. A letter dated January 19, 1972 from an officer of Prel authorizes the delivery to Sternberg of 10,000 shares. Plaintiff's attorney acknowledges that he has no direct proof of what Gold received on the sale to Sternberg but relies on the inferences from the documents and circumstances" (86a).

It is quite clear from the aforestated paragraph from Magistrate Jacobs' report that the plaintiff failed to establish a *prima facie* case. There is no proof that Gold sold any shares to Sternberg and how much if anything he received on such sale. The report clearly states that the plaintiff's attorney acknowedged that he has no direct proof, but relies on inferences from documents and circumstances. The method of computing the current market value of investment securities was inconsistent with industry standards. It is generally accepted in the securities industry that unregistered investment stocks sell for one-third to fifty percent of the value of registered stocks.

The Magistrate's findings were made without Mr. Gold's presence. Elementary fairness would dictate the subpoena or deposition of Oscar Sternberg before the Magistrate made such a finding as the basis for entry of default judgment. More important, the defendant had clearly set forth in his motion papers a letter from his accountant that the shares in question were transferred to his brother-in-law, Oscar Sternberg without consideration (7a-8a). The record in the case fails to support the court's decision that the plaintiff had established a *prima facie* case.

3. The default was not due to mistake or excusable neglect.

The affidavit of Meyer Gold, a man of limited education, clearly sets forth that the default was due to mistake or excusable neglect. In fact, it is apparent from the affidavit that at the time he prepared the affidavit he still did not know why a judgment had been entered against him (9a).

Mr. Gold in his affidavit, set forth the fact that there is no truth or validity to the plaintiff's action and that he requests an opportunity to have a fair trial and hearing (9a).

The Court without an evidentiary hearing resolved all doubts against the defendant and failed to provide relief against the onerous consequences of the default judgment. The Court in its opinion failed to rule on the issue of wilfulness.

ARGUMENT

I.

The District Court abused its discretion and applied the wrong standard in denying defendant's motion under Fed. R. Civ. Pro. 60(b), since defendant more than made a *prima facie* showing on the issues of mistake, and excusable neglect. Upon such a showing, this Court has required that Rule 60(b) be liberally construed to permit a party to defend on the merits, especially where, as here, meritorious defenses have been alleged and a large default judgment is at stake.

Fed. R. Civ. Pro. 60(b) provides in relevant part that:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . ."

The federal courts, including this Court, have consistently mandated a liberal construction of Rule 60(b) in an effort not to

deprive a litigant of a trial on the merits. This policy has been carried out even in circumstances where the conduct sought to be excused was "an affront to the Court" and could not be "condoned," or was found to be "improper" or involved some form of "neglect." See, e.g., *Vac-Air, Inc. v. John Mohr & Sons, Inc.*, 471 F.2d 231 (7th Cir. 1973); *Peterson v. Term Taxi Inc.*, 429 F.2d 888 (2nd Cir. 1970); *Radack v. Norwegian America Line Agency, Inc.*, 318 F.2d 538 (2nd Cir. 1963). Whether the question is to vacate an order striking an answer under Rule 37 for failure to comply with discovery obligations as in *Vac-Air*, cited above, or other orders entered for non-compliance with the party's obligations under the Federal Rules, Rule 60(b) is

> ". . . to be liberally construed in order to provide relief from the onerous consequences of defaults and default judgments [cite omitted]. Any doubts about whether relief should be granted should be resolved in favor of setting aside the default so that the case may be heard on the merits. . . ." *Tolson v. Hodge*, 411 F.2d 123, at 130 (4th Cir. 1969).

In exercising its powers under Rule 60(b), the courts have stressed four key factors, namely:

1. Does the party have a substantial claim or defense;

2. Will real prejudice result in the other party from vacating the order in question;

3. Will a judgment for a large sum of money be made without a hearing on the merits; and

4. Resolving the issues of fact favorable to the party seeking to be relieved, is there a showing of mistake, inadvertence or excusable neglect.

In addition to the cases cited above, see *Erick Rios Bridoux v. Eastern Air Lines, Inc.*, 214 F.2d 207 (D.C. Cir. 1954); *In re Kosmadakes*, 444 F.2d 999 (D.C. Cir. 1971); *Daly v. Stratton*, 304 F.2d 666 (7th Cir.), *cert. den.*, 371 U.S. 934 (1962).

A reading of the District Court's memorandum and order denying the defendant's motion reveals that no cognizance was taken of the policy underlying or standards to be applied on such a motion. In concluding that the defendant had persistently ignored the orders of the Court and that the plaintiff had proved a *prima facie* case, it appeared the Court erred in its factual conclusions and that little, if any weight was given to the moving affidavits, notwithstanding the requirement that "any doubts about whether relief should be granted should be resolved" in favor of movant. *Tolson v. Hodge, supra* at 130. In fact, failure to take cognizance of the moving affidavits had been held to be reversible error under Rule 60(b). See *Welden v. Grace Lines, Inc.*, 404 F.2d 76 (2nd Cir. 1968). As noted above, this Court has reversed for failure to provide relief under Rule 60(b) even where plaintiff exhibited "failure of good judgment and (the) conduct was an affront to the Court." *Peterson v. Term Taxi, Inc., supra* at 891.

We have shown in the state of facts above that defendants more than satisfied each of the factors which the courts look to in determining whether to vacate an order disposing of a case without a trial on the merits. We have shown that (1) defendants

set forth highly meritorious defenses and, indeed, may be entitled to judgment as a matter of law; (2) that the judgment involved is for a large sum of money; (3) that the plaintiff would not have been prejudiced by granting the motion since the defendant had offered to post a bond; and (4) that defendants' affidavits made at the least a *prima facie* showing of mistake or excusable neglect.

The District Court Circuit has affirmed the principle that

> ". . .Since courts universally favor trial on the merits, slight abuse of discretion in refusing to set aside a default judgment is sufficient to justify a reversal of the order. *Madson v. Petrie Tractor & Equipment Co.*, 196 Mont. 382, 77 P.2d 1038, 1040." *Erick, supra* at 210.

In summary, the lack of prejudice to the plaintiff coupled with the meritorious defense and the size of the judgment involved collectively establish that there was an abuse of discretion on the part of the District Court judge in not relieving the defendant of the default judgment.

II.

The District Court erred in that its decision was not based on findings as to the "good faith and wilfulness of all the parties".

The Supreme Court has cautioned as to the "constitutional limitations" upon the powers of the courts ". . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale, etc. v. Rogers,* 357 U.S. 197, 209 (1958). They held that substantial constitutional questions are "provoked" when a pleading is stricken under Rule 37 in the circumstances where a party did not intentionally fail to comply with outstanding discovery orders.

Unquestionably, the moving affidavits on the motion under Rule 60(b) showed that there had been no failure on the part of the defendant to act in good faith, nor did he wilfully disregard any order of the Court. It is quite apparent that the defendant was totally unaware of the proceedings and confused and misinformed as to the reason for the judgment.

The District Court was presented with affidavits which raised contested issues of fact as to the defendant's conduct and what knowledge he had. See *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858 (5th Circuit 1970), (reversing for futher proceedings an order under Rule 60(b) where it appeared that the failure to comply with an outstanding discovery order was not wilful or in bad faith).

The District Court did not examine the good faith of the plaintiff in obtaining the default judgment. The moving affidavit of the plaintiff's attorney demonstrated that he did not personally notify the defendant of any of the proceedings after service of complaint and interrogatories until after he had entered a default judgment. The plaintiff's attorney was aware of the fact that the defendant's attorney after answering the complaint failed to appear at the pre-trial conference and would continue to default in the future proceedings. This Court has held that personal notice should have been sent personally as well as to the attorney once it became known that the attorney who instituted the action had disappeared:

> ". . . The procedure followed in the case of sending all notices, motions and orders to Ennis after it was known that he had disappeared seems to indicate a disposition to take refuge in the empty formality of fulfilling the letter of the legal requirements while disregarding realistic demands of the situation. Surely, once it became known that Ennis had disappeared notice of action proposed or taken should have been sent to plaintiff personally. In the absence of a court order, directing such service, the defendant's attorneys were at fault for failing to do what common sense required. In doing so they took unfair advantage of the plaintiff. *Vindigni v. Meyer*, 441 F.2d 376 (2nd Cir. 1971)."

In summary, the "good faith and wilfulness" of all of the parties must be closely examined in default judgments. The

Court should consider whether either party took unfair advantage of the other in obtaining the default. Where it is apparent, as in this case that unfair advantage was taken, then the interest of justice requires that the default be vacated and a trial be held on the merits.

III.

The District Court made findings of facts that were not supported in the moving affidavits and were factually incorrect. The District Court would have abused its discretion had it denied the defendant's motion to vacate where it was established that counsel rather than client was at fault.

The decision of the District Court was based on two erroneous facts which were not supported in the moving affidavits of the parties, nor in the record.

1) The Court found that the defendant Gold persistently ignored the orders of the Court which were directed both to him and his attorney.

2) The record in this case demonstrates that the plaintiff established a *prima facie* case before Magistrate Jacobs.

The record is well established to the fact that Gold was personally served with the summons, complaint and interrogatories which he forwarded to his attorneys. An answer was filed by his attorneys and all proceedings subsequent to the answer, up to and including default judgment, were served only on his attorneys and remained unanswered without

explanation. Mr. Gold's sworn explanation was that he had no knowledge of any of the proceedings and did not in fact know or understand why a default judgment had been entered (9a). There is nothing in the record which would support the Court's findings that Gold persistently ignored orders of the Court which were directed to him.

The affidavits did not support the fact that Gold continually ignored all notices and orders of the Court. This Court in *Flaks et al. v. Koegel et al.*, CA-2 #74-1437 September 25, 1974 slip opinion page 5551, 5570 stated:

> ". . . If counsel rather than client were at fault and if serious efforts to obtain new counsel had been made under the handicaps described, then the order entering the default judgment was an abuse of discretion. See *Vindigni v. Meyer*, 441 F.2d 376 (2nd Cir. 1971); *Patterson v. C.I.T. Corp.*, 352 F.2d 333 (10th Cir. 1965)."

This Court in a similar case *Radack v. Norwegian American Line Agency, Inc.*, 318 F.2d 538, 542 (2nd Cir. 1963), reversing denial of relief below, stated:

> ". . . Rule 60(b) Relief Acts as a corrective remedy, mitigating impact of calendar rules when a litigant's action is dismissed as a result of his counsel's neglect."

Had the District Court ruled on the facts as presented, it would have been an abuse of discretion to deny the motion

based on the fact that the attorneys rather than the client were at fault.

Gold by his sworn statements, denies any knowledge of the defaults. The plaintiff's attorney and the Court, aware of the default and the size of the judgment involved, should have taken very precise steps to make the defendant aware of the proceedings. In the *Flaks* case, *supra,* the Court wrote a letter to the defendant personally notifying him of the proceedings. This did not happen in this action.

The moving affidavits make no mention of a *prima facie* case being established before Magistrate Jacobs, but only state that a hearing was held and recommendations were made which was the basis for the judgment which was entered. An examination of Magistrate Jacobs' report (82a-91a) which was not part of the motion papers, would have failed to disclose a *prima facie* case.

In summary, the erroneous findings of facts which were not supported in the moving affidavits were the basis for the Court's decision and accordingly should be reversed.

IV.

The District Court was required to hold an evidentiary hearing to determine the truth of the matters and the issues of fact presented in the defendant's moving affidavits on its motion to vacate under Rule 60(b).

The Supreme Court has cautioned as to the "constitutional limitations upon the powers of courts . . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause". *Societe Internationale, etc. v. Rogers,* 357 U.S. 197, 209 (1958). The moving affidavits made a *prima facie* showing as to the defendant's good faith, mistake, and excusable neglect. If such sworn statements are true, as we must assume they are, the District Court's action plainly violated the defendant's constitutional rights under *Rogers.* See *Dorsey v. Academy Moving & Storage, Inc., supra.*

At the least the District Court was presented with affidavits which raised contested issues of fact as to the circumstances surrounding defendant's conduct and what knowledge he in fact had in connection with his alleged failure to comply with his discovery obligations.

The Fifth Circuit reversed the striking of a complaint for failure to comply with an outstanding discovery order, since the District Court

> ". . . held no hearing on the plaintiff's ability to furnish the information and made no finding that the failure . . . was wilful, in bad faith or that the

plaintiff had not made diligent effort to obtain such information" *(Dorsey, supra,* at 860).

This Court has also in similar circumstances reversed and required a "full evidentiary hearing". See *Flaks v. Koegel; Vindigni v. Meyer, supra.* Indeed, on motions that have far less consequences to a party's rights than those involved here, this Court has held that a testimonial hearing must be had. Chief Judge Kaufman states:

> "Generally, a judge should not resolve factual disputes on affidavits or depositions, for then he is merely showing a preference for one piece of paper to another." *Dopp v. Franklin National Bank,* 461 F.2d 873, 879 (2nd Cir. 1972); see also, *Sims v. Greene,* 161 F.2d 87-88 (3rd Cir. 1947).

The Court in *Flaks v. Koegel* stated:

> "This matter could not be determined on the basis of conflicting and competing affidavits. We are in no better or worse position than the District Court was in the absence of evidence which a hearing could produce to determine whether or not Koegel's claims were credible. This position is not sufficiently secure to support the drastic action taken. We are persuaded that the proper resolution is to reverse the order denying the Rule 60(b) motion and remand for an evidentiary hearing so that appropriate

> findings may be made consonant with the due process standards we have discussed."

The general rule concerning evidentiary hearings has been applied in the context of a Rule 60(b) motion. In *Federal Deposit Insurance Corp. v. Alker*, 234 F.2d 113 (3rd Cir. 1956) the Court wrote:

> "Obviously such a determination (as to where relief under 60(b) should be granted) could only be made after a full hearing in the District Court at which the defendants have an opportunity to produce their witnesses and plaintiffs their rebutting witnesses" *(Id.* at 117). See also, *Vindigni v. Meyer, supra.*

In summary, failure to hold an evidentiary hearing is not only a clear abuse of discretion, but it also deprives the defendant of his property without due process of law.

CONCLUSION

The order denying defendant's motion under Fed. R. Civ. Pro. 60(b) should be reversed.

Respectfully submitted,

LAMPERT & LAMPERT
Attorneys for Defendant-Appellant

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

US COURT OF APPEALS, SECOND CIRCUIT

HANDEL,
Plaintiff-

against

GOLD & PREL CORP.,
Defendants.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 9th day of December 1974 at *

deponent served the annexed Brief upon

*

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

James Steele

Print name beneath signature

JAMES STEELE

Sworn to before me, this 9th day of December 1974

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

* Borden & Ball- 345 Park Ave., New York

* Kaufman, Taylor, Kimmel & Miller,- 41 E. 42nd St., NY